INTERIOR BOARD OF INDIAN APPEALS

David Jackson, M & M Farms v. Portland Area Director, Bureau of Indian Affairs

35 IBIA 197 (09/25/2000)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

DAVID JACKSON, M & M FARMS, Appellant	:	Order Affirming Decision as Modified and Remanding Case for Reassessment of Trespass Damages
v.	:	
	:	Docket No. IBIA 99-105-A
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	September 25, 2000

This is an appeal from an August 2, 1999, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Lease 91-123 on the Fort Hall Reservation and the assessment of trespass damages against David Jackson of M & M Farms (Appellant), who was the lessee under that lease. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein and remands this case to him for reassessment of trespass damages.

Lease 91-123 was a two-year business lease with a term beginning January 1, 1991, and ending December 31, 1992. 1/ The lease covered 10.07 acres of Fort Hall Allotment 1796 and provided for an annual rental of $2,350. It was approved by the Superintendent, Fort Hall Agency, BIA, on June 24, 1992.

1/ The lease term was limited to two years because the majority landowner, Daisy Snipe, had died and her heirs had not been determined. See 25 C.F.R. §§ 162.2(a)(3); 162.8(e). It appears from the record that a determination of Snipe's heirs was made sometime before April 1995.

Evidently, Appellant had an earlier lease, i.e., Lease 459, which covered the same property that was later subject to Lease 91-123. No copy of Lease 459 is included in the record. From various statements in the record, however, it appears that Lease 459 expired on Dec. 31, 1990, and that, although it contained an option authorizing Appellant to extend the term of the lease for a 25-year period, Appellant did not exercise the option.

On July 17, 1992, Appellant applied for a 10-year business lease of the same property, with a term to begin on January 1, 1993. Nothing in the record shows that any action was taken on the application.

Evidently, Agency staff erroneously labelled the file for Lease 91-123 with an expiration date of December 31, 1997, rather than December 31, 1992. On October 7, 1992, the Agency sent Appellant a bill stating: "RENTAL DUE December 1, 1992 for lease period 1/01/93 thru 12/31/93 on LSE #91-123 covering Allotment No. 1796 . . . . $2,350.00." Appellant paid the bill and remained on the property. BIA continued to send bills, and Appellant continued to pay them, through 1997. It appears that Appellant also paid rent for 1998, but it is not clear whether BIA billed Appellant for 1998. 2/

On October 5, 1998, six of the owners of Allotment 1796 wrote to the Superintendent, stating:

> As majority landowners of Allotment #1796, previous lease #91-123 * * *, we direct [BIA] NOT TO ACCEPT any lease payment for this parcel from [Appellant] or any other person for 1999.
>
> Since 1992, there has been no valid lease on file and we have requested that a new appraisal, inventory, survey, and fair compensation for past years be completed and accepted by us before any new lease can be negotiated.

On October 16, 1998, the Superintendent wrote to Appellant, stating that Lease 91-123 had expired on December 31, 1992, and further stating:

> The decision of [BIA] is to determine trespass damages starting January 1, 1993, after Lease 91-123 expired. [BIA] will appraise the business site with the fixed improvements being the property of the landowners. [3/] The total amount

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2/ BIA bills and receipts, as well as an apparent BIA ledger sheet, are included in the record, but only in the form of attachments to Appellant's statement of reasons before the Area Director. That is, there are no copies of these documents taken directly from BIA records.

The BIA bill for 1998 does not list Lease 91-123 and does not include the lease rental of $2,350 in the total shown as due. However, at the bottom of the bill, the phrase "#91-123 $2350 Bus." has been written in by hand. It is not clear whether the addition was made by a BIA employee or by Appellant.

No receipt for 1998 is included in the record. The apparent BIA ledger sheet seems to show payment of 1998 rent, although it is not entirely clear in this regard.

3/ Provision 2 of Lease 91-123 states: "Unless otherwise provided herein it is understood and agreed that any buildings or other improvements placed upon the said land by the lessee becomes the property of the lessor upon termination or expiration of this lease."

due will be assessed minus the amount already paid by administrative errors. In addition interest at 18% per annum will be charged.

Appellant appealed to the Area Director. On August 2, 1999, the Area Director affirmed the Superintendent's decision but modified it as to the interest rate to be charged. The Area Director stated:

> [Appellant's] lease expired December 31, 1992. There is no authority for hold-over tenancies on Indian land. Furthermore, at the expiration of the lease, the improvements became the property of the Indian landowners. [Appellant] was in trespass since he occupied the property after the lease expired under its own terms. He owes trespass damages in the amount of the unpaid fair annual rentals, if any.
>
> I am directing that the Superintendent request an appraisal to determine the rental amount for the period after the lease expired on December 31, 1992. The appraisal is to include the value of the improvements since they became the property of the landowners upon expiration of the old lease, and to cover the period from January 1, 1993, to either the present time, or the date when [Appellant] vacated the premises. The difference between the amounts that [Appellant] paid (the expired lease's rate) and the appraised value (including improvements) is the amount owed and this amount is subject to interest since it is delinquent. Although the Superintendent indicated that interest at 18% per annum will be charged, this is the amount that is included in the leases and agreed upon by the parties. There is no lease and so this amount cannot be utilized. We believe that a reasonable rate to be used for the period would be 6%. Once the appraisal is obtained, the Superintendent will inform you what is owed.
>
> [Appellant] should immediately proceed to obtain a lease if he wishes to continue utiliz[ing] the property.

Area Director's Aug. 2, 1999, Decision at 4.

On appeal to the Board, Appellant contends that he "occupied and used the Leasehold under Lease No. 91-123 during the years 1991 through 1998," Appellant's Opening Brief at 3; that he paid rent every year during that period after receiving a bill from BIA; and that he was never given notice by BIA that he was occupying the leasehold improperly. He further contends that, under these circumstances, he was a lawful holdover tenant under governing law. 4/

As to the governing law, Appellant contends that, because the regulations in 25 C.F.R. Part 162 "do not prohibit holdover tenancies, and simply are silent on the subject, * * * the

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4/ Appellant does not contend that his tenancy continued after Dec. 31, 1998. Nothing in this decision should be construed to apply to any period after Dec. 31, 1998.

principles of general contract law that recognize holdover tenancies under these circumstances must be applied." Id. at 7.

Appellant argues that holdover tenancies have been recognized in Federal case law (not involving Indian lands) and in the law of several states, including Idaho. He cites Board cases for the principle that, in the absence of a controlling Federal statute or regulation, Federal case law and even state law may be consulted for guidance in resolving a dispute concerning a lease of Indian land. E.g., Kearny Street Real Estate Co., L.P. v. Sacramento Area Director, 28 IBIA 4 (1995).

Although the principle Appellant describes is sound, it has no application here. In this case, there is a Federal statute directly on point. 25 U.S.C. § 415 requires that leases of Indian land be approved by the Secretary. Further, the regulations implementing that statute require that the Secretary's approval be in writing and that the lease be in a form approved by the Secretary. 25 C.F.R. § 162.5(a).

The lack of any written approval is fatal to Appellant's holdover tenancy theory. It is equally fatal to his alternative theory that BIA and Appellant entered into a series of annual leases through a course of conduct (i.e, the sending of bills by BIA and the payment of rent by Appellant). As the Board has held on a number of occasions, an unapproved lease of Indian land is void and grants no rights to any party. Brooks v. Muskogee Area Director, 25 IBIA 31, 34 (1993), and cases cited therein.

The Board finds that Appellant did not have a valid lease covering Allotment 1796 for the period 1993-1998.

Appellant next argues that BIA is estopped from asserting a trespass. Although recognizing that estoppel is a difficult defense to raise against the Government, Appellant contends that the traditional elements of estoppel are present in this case.

The traditional elements of estoppel are:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

Falcon Lake Properties v. Assistant Secretary - Indian Affairs, 15 IBIA 286, 298 (1987), quoting from Morris v. Andrus, 593 F.2d 851, 854 (9th Cir. 1978), cert. denied, 444 U.S. 863 (1979). See also Naegele Outdoor Advertising Co. v. Acting Sacramento Area Director, 24 IBIA 169, 181 (1993).

The primary difficulty Appellant faces in making this argument lies with the third element))that the party asserting estoppel must be ignorant of the true facts. Lease 91-123, of which Appellant had a copy, stated that it expired on December 31, 1992. In July 1992, Appellant applied for a new lease to begin on January 1, 1993, thus demonstrating his awareness of the date on which Lease 91-123 would expire. Further, as a person doing business on Indian land, Appellant was responsible for familiarizing himself with the regulations governing his activities. E.g., Racquet Club Properties, Inc. v. Acting Sacramento Area Director, 25 IBIA 251, 256 (1994). Thus, Appellant was charged with knowledge of the leasing regulations in 25 C.F.R. Part 162, including the requirement that a lease of Indian land be approved in writing. 5/

Under these circumstances, Appellant cannot credibly claim ignorance of the fact that he lacked an approved lease of Allotment 1796 for the period after December 31, 1992. Thus, the traditional elements of estoppel are not present here.

Even so, it is apparent that BIA's actions in this case were misleading. By billing Appellant for annual rent and accepting payment from him, BIA led Appellant to believe that it did not object to his presence on the property. Further, during the term of Lease 91-123, BIA had permitted Appellant to use the property without an approved lease for one and one-half years (three-fourths of the lease term) before approving the lease. That history, coupled with BIA's annual issuance of rental bills for the period after December 31, 1992, might well have caused Appellant to believe that a belated lease approval would again be forthcoming.

Under the Area Director's decision, Appellant would be required to pay substantial trespass damages. As stated in their decisions, both the Superintendent and the Area Director held that improvements to the land became the property of the landowners after December 31, 1992. A BIA appraisal prepared in July 1999 estimated the fair annual rental for the land and improvements to be $25,400 as of the date of the appraisal. Presumably, the appraisal called for by the Area Director (i.e., land and improvements for the period beginning January 1, 1993) would estimate a similar fair annual rental for each year of the period 1993-1998. Thus, the Area Director's decision would likely require Appellant to pay trespass damages well in excess of $100,000.

A March 1998 BIA appraisal estimated the fair annual rental of the land alone to be $2,450. Thus it appears that most of the $25,400 annual rental value estimated in 1999 was based upon the improvements.

5/ Appellant is clearly not a novice lessee of Indian land. The record shows that he holds a number of other leases on the Fort Hall Reservation. As noted above, he held a lease of Allotment 1796 prior to Lease 91-123. Further, he stated in a 1998 affidavit that his "farming business has occupied the Leasehold for many years." Dec. 11, 1998, Jackson Affidavit at ¶ 3.

Appellant states that the improvements were made by him. He argues:

> The [Area] Director's decision, if left intact, will cause [Appellant] to have to pay enormous sums as "rent" on the improvements [Appellant himself] made to the Leasehold. Although Lease No. 91-123 provides that such improvements become the property of the lessors upon termination, it is outrageous to apply this provision as of December 31, 1992, despite [Appellant's] continuing possession of the Leasehold for an additional six years, in which the Superintendent acquiesced.

Appellant's Opening Brief at 20.

In light of BIA's acquiescence))indeed its apparent active encouragement))of Appellant's continued presence on the property, the Board finds that the trespass damages assessed by BIA are unreasonable.

It cannot be denied, however, that Appellant was technically in trespass during the period 1993-1998. While he would undoubtedly contend that his technical trespass caused no injury to the land or the landowners, and there is no suggestion that the land has suffered any damage, it is conceivable that the landowners have suffered some injury. 6/

At present, BIA has no trespass regulations which might, even arguably, apply here. 7/ Therefore, the Board finds that it should exercise its authority under 43 C.F.R. § 4.318 in order to establish a methodology for assessing trespass damages which is appropriate to the particular circumstances of this case.

6/ In the Oct. 6, 1998, letter quoted above, some of the landowners stated that they sought "fair compensation" for the period 1993-1998. The record does not reflect any further communications from the landowners. Nor have they participated in this appeal, although they have been fully advised of their right to do so.

In the absence of any elaboration from the landowners as to what they consider to constitute "fair compensation," the Board presumes that they seek "fair annual rental" or the compensation they would have been entitled to receive had a proper lease been in place during the period 1993-1998.

7/ BIA does have regulations for certain specific types of trespass, e.g., 25 C.F.R. § 163.29 (forest trespass); 25 C.F.R. § 166.24 (livestock trespass).

On July 14, 2000, 65 Fed. Reg. 43874, BIA published proposed revisions of its leasing and grazing regulations which would, among other things, implement the agricultural trespass provisions of the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3713. The proposed regulatory trespass provisions appear in proposed 25 C.F.R. §§ 162.160-162.179, 65 Fed. Reg. 43931-43933, and proposed §§ 166.800-166.819, 65 Fed. Reg. 43947-43949.

All things considered, the Board concludes that trespass damages here should be based upon the fundamental principle that the landowners were entitled to receive timely payments of fair annual rental. Guided by that principle, and taking into account Appellant's contention that Lease 91-123 was, through BIA's actions, extended through 1998, the Board adopts the hypothesis, for purposes of this discussion only, that the lease was so extended.

Had Lease 91-123 covered the period 1991-1998, BIA would have conducted a rental review for the period beginning in 1996 and would have adjusted the lease rental to reflect that review. See 25 C.F.R. § 162.8; Provision 7 of Lease 91-123. Thus, the landowners would have received an increase in rental for the years 1996-1998 if the rental review showed that it was warranted.

As noted above, BIA's 1998 appraisal estimated fair annual rental for 1998 at $2,450. Upon remand of this case to the Area Director, as the Board orders below, Appellant may choose to accept this appraisal as establishing fair annual rental for each of the years 1996 through 1998. If he does not so choose, the Area Director shall have an appraisal prepared to estimate fair annual rental (without improvements) as of 1996, the year that a rental review would have been prepared under the hypothesis adopted by the Board.

Appellant's trespass damages shall be the difference between the amount he has already paid for 1996-1998 and the fair annual rental for those years under either the 1998 appraisal or the new appraisal discussed in the preceding paragraph. In addition, because the analysis employed here hypothesizes the extension of Lease 91-123, the Board reinstates the 18% interest rate which was imposed by the Superintendent but rejected by the Area Director. 8/ Thus, Appellant shall also pay interest on the previously unpaid amount in accordance with Provision 5 of Lease 91-123.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's August 2, 1999, decision is affirmed as

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8/ As noted by the Area Director, the 18% rate is a feature of the lease. Provision 5 of Lease 91-123 states:

"It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest at the rate of 18% per annum will become due and payable from the date such rental became due and will run until said rental is paid."

modified to require the use of a different method of assessing trespass damages. This case is remanded to the Area Director for reassessment of trespass damages in accordance with this order. 9/

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

9/ In the final sentence of his opening brief, Appellant states that he "seeks to have an award allowing [him] to recover the costs and attorney fees [he] has been required to expend in pursuing this appeal, under applicable law." Appellant's Opening Brief at 21-22.

If Appellant believes he is entitled to an award of costs or attorney fees under any law, he may submit an application for such an award, identifying the law he believes is applicable. He is referred to the Department's regulations implementing the Equal Access to Justice Act, 43 C.F.R. §§ 4.601-4.619, and to the Board's decisions in Abbott v. Billings Area Director, 21 IBIA 137 (1992), and Utu Utu Gwaitu Paiute Tribe v. Sacramento Area Director, 17 IBIA 141 (1989), construing those regulations.